

From: Ron Hilton
To: Microsoft ATR
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Subject: Microsoft Settlement

COMMENTARY ON PROPOSED MICROSOFT ANTITRUST SETTLEMENT:

I have studied the various documents pertaining to the Microsoft antitrust case, including the complaint, the proposed settlement, and the competitive impact statement. In general, I believe that the settlement is a step in the right direction, but is far too ridden with loopholes to be effective as a practical remedy.

To the extent that the settlement requires full disclosure of APIs and protocols, it represents a very satisfactory remedy. The Windows APIs and protocols have become a de-facto standard in the computing industry. Such standards are vital to the interchangeability of software components that must exist in order to enable consumer choice and true competition. However, when one company exercises complete hegemony over such a standard, and can unilaterally shape it to their advantage, with undisclosed interfaces that they alone are able to exploit, anticompetitive harm to the consumer is the inevitable result.

Unfortunately, the settlement in its present form is too limited in scope with too many escape clauses to have any real remedial effect. In particular:

1. Section III. D. allows Microsoft to evade full disclosure by requiring membership in the Microsoft Developer Network (MSDN) in order to receive the information. There is nothing to prevent Microsoft from imposing unreasonable fees or other restrictions on MSDN membership so as to deter a potential competitor from obtaining the information.
2. Section III. J. 1. allows Microsoft to evade full disclosure in the name of "security." Security that relies upon obscurity is no security at all. There is much greater security in having an open standard that can be scrutinized and critiqued by all, thereby identifying and eliminating whatever vulnerabilities may exist. Microsoft's dismal record on security speaks for itself on this point.
3. Section III. J. 2. b) allows Microsoft to evade full disclosure by maintaining that a competitor has no "reasonable business need" for the information.
4. Section III. J. 2. c) allows Microsoft to evade full disclosure by refusing to certify the "authenticity and viability" of a potential competitor. Microsoft cannot possibly be objective in making such a determination. The conflict of interest is simply too great.
5. Section III. J. 2. d) allows Microsoft to evade full disclosure by imposing an arbitrarily onerous and expensive burden of proof of

compatibility on a potential competitor.

6. Section VI. J. and K. allow Microsoft to evade full disclosure by simply electing not to separately trademark a middleware product that utilizes the API or protocol in question. They can still use the trademarks "Microsoft" and "Windows" in connection with the product without having to disclose the APIs or protocols in question.
7. Section VI. N. allows Microsoft to evade full disclosure to competitors who have not already sold at least one million copies of a competitive product. This is a catch-22 which effectively prevents any small start-up from ever gaining a foothold in the Windows-compatible marketplace in the first place.

The bottom line is that under the proposed settlement, there are any number of ways in which Microsoft can easily evade full disclosure of the de facto standard Windows APIs and protocols which the industry as a whole needs in order to provide true consumer choice among competitive, fully compatible software products.

Here is the remedy that I would propose instead:

1. Microsoft must fully disclose all Windows APIs and protocols by making them freely accessible to the public via the Internet as of the date of the beta release of any software product that employs such APIs or protocols.
2. Any competitor who extends or otherwise modifies the Windows APIs or protocols for their own product must likewise fully disclose such extensions or modifications by making them freely accessible to the public via the Internet as of the date of the beta release of any such software product.

The second requirement above is an important one. It is designed to prevent the proliferation of multiple proprietary, incompatible variations of the Windows standard. That is what caused the fragmentation of the original Unix standard, as Unix competitors sought to "lock in" their customers in much the same way that Microsoft has done with the Windows standard. Only an open standard which is required to remain an open standard can provide a reliable foundation for innovation based on true merit that provides real choice to consumers in a fair and level competitive environment. Unix started out open but became proprietary. Windows started out proprietary, but must become open.

Please note that I am not advocating that Windows become open source. The source code is Microsoft's intellectual property and should not be confiscated. Only the external interfaces (i.e. APIs and protocols) need to be fully opened up to the public.

Thank you,

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